

**MAY 6 2003**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUIS REY GARCIA,

Petitioner - Appellant,

v.

ADELE FASANO, DISTRICT DIRECTOR,  
U.S. IMMIGRATION AND  
NATURALIZATION SERVICE, Director of  
the Immigration and Naturalization Service,

Respondent - Appellee.

No. 02-56049

D.C. No. CV-02-00341-IEG

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Irma E. Gonzalez, District Judge, Presiding

Submitted April 8, 2003\*\*  
Pasadena, California

Before: BEEZER, FERNANDEZ, and PAEZ, Circuit Judges.

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Luis Rey Garcia appeals the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241. We have jurisdiction under 28 U.S.C. § 2253 and we affirm.

We review a district court's denial of a petition for a writ of habeas corpus *de novo*. Wade v. Terhune, 202 F.3d 1190, 1194 (9th Cir. 2000). Garcia is not eligible for INA § 212(c), 8 U.S.C. § 1182(c), relief because Garcia did not plead guilty. Garcia proceeded to trial and was convicted by a jury. See Amendariz-Montoya v. Sonchik, 291 F.3d 1116, 1121-22 (9th Cir. 2002) (holding that § 212(c) relief under St. Cyr is not available to a defendant convicted by a jury) (citing INS v. St. Cyr, 533 U.S. 289, 321-22 (2001)).

The fact that Garcia did not receive a plea bargain offer does not alter our application of Amendariz-Montoya. See United States v. Estrada-Plata, 57 F.3d 757, 760 (9th Cir. 1995) (explaining the decision to offer a plea bargain is a matter of prosecutorial discretion). Nor is a motion to reduce a conviction from murder to voluntary manslaughter the functional equivalent of a plea bargain. Because Garcia had already been convicted by a jury for second degree murder, Garcia stood only to gain from his motion. See Jimenez-Angeles, 291 F.3d 594, 602 (9th Cir. 2002) (“A plea bargain is a formal exchange in which each side consensually gives, and gets, something of value.”).

Garcia waived his INA § 212(h), 8 U.S.C. § 1182(h), equal protection challenge for purposes of appellate review by failing to raise it before the district court. See Arizona v. Components Inc., 66 F.3d 213, 217 (9th Cir. 1995).

The judgment of the district court is AFFIRMED.